BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIBEL ARPERO Claimant	)	
VS.	)	
NATIONAL BEEF PACKING CO. LP Respondent	)	Docket No. 1,016,097
AND	)	
LIBERTY MUTUAL INS. CO. **FIDELITY & GUARANTY INS. CO.** Insurance Carriers	)	

ORDER

Claimant and respondent and its insurance carrier, Liberty Mutual Insurance Co., request review of the September 28, 2005 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on January 4, 2006.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. Terry J. Malone of Dodge City, Kansas, appeared for respondent and its insurance carrier, Liberty Mutual Insurance Co. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent and its insurance carrier, Fidelity & Guaranty Insurance Co.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged bilateral upper extremity injuries which she argued continued after she was placed in a lighter duty job to accommodate her restrictions. Claimant performed the accommodated job for approximately two years and was then terminated

for failing to call in or show up for work for three consecutive days. But claimant alleged she left work because of the continued upper extremity pain the accommodated job caused. Accordingly, claimant argued she was entitled to a work disability.

The Administrative Law Judge (ALJ) determined claimant did not suffer additional injury to her bilateral upper extremities after she was placed in the accommodated job. Consequently, the ALJ found the date of accident for the bilateral upper extremity injuries to be June 11, 2002, the date claimant was placed in the accommodated job. The ALJ further determined claimant, without justification, voluntarily left the accommodated job and was limited to her 12 percent functional impairment for her bilateral upper extremity injuries. The ALJ also awarded claimant a 5 percent scheduled disability to her finger as a result of an injury suffered February 10, 2004, while performing the accommodated work.[1]

Claimant requests review of the nature and extent of disability. Claimant argues she continued to suffer repetitive injuries to her bilateral upper extremities while performing the accommodated work, left work because of her ongoing pain complaints and is entitled to a work disability. In the alternative, claimant argues her functional impairment should be increased.

Respondent, through its two insurance carriers, argues inconsistent positions. On the one hand, respondent and its insurance carrier, Liberty Mutual Ins. Co. (Liberty), argue that claimant continued to suffer repetitive upper extremity injuries after she was placed in the accommodated job and consequently her date of accident should be her last day worked. As that date, June 12, 2004, was outside the time period[2] Liberty provided respondent's workers compensation insurance coverage, Liberty argues it should not be liable for claimant's permanent partial disability compensation.

Conversely, respondent and its insurance carrier, Fidelity & Guaranty Ins. Co. (Fidelity), argue that all three doctors testified claimant did not suffer additional injury to her bilateral upper extremities after she was placed in the accommodated job. Fidelity further argues the date of accident for the bilateral upper extremity injuries should be the attenuating event when claimant was placed in the accommodated job. Consequently, Fidelity requests the Board to affirm the ALJ's Award.

Finally, respondent and both of its insurance carriers argue claimant failed to make a good faith effort to retain accommodated work and accordingly should be limited to her functional impairment as determined by the ALJ.

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[1] This finding is not disputed by the parties.

[2] September 1, 2001 through August 31, 2002.

The only issues before the Board on this appeal are the date of accident for claimant's bilateral upper extremity injuries and the nature and extent of disability, specifically whether claimant is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed. The ALJ, in the Award, sets forth findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order.

Claimant alleged a series of accidents and repetitive trauma injuries beginning June 2002 through her last day worked. However, in order to determine which insurance carrier is liable, a single accident date must be determined.

Following the creation of the bright line rule in the 1994 *Berry*[3] decision, Kansas appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*[4] which is one of the most recent decisions on point, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[5]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[6]

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[3] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[4] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[5] *Id.* at Syl. ¶ 3.

[6] *Id.* at Syl. ¶ 4.

In *Treaster,* the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held the appropriate date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The *Lott-Edwards*[7] decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day worked rule is applicable if the work performed in an accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

In this case, the claimant began treatment for complaints of pain in her forearms, elbows and hands in June 2002. A physician's assistant, Danny Briggs, first examined claimant on June 7, 2002. When he examined her again on June 11, 2002, he placed claimant on restrictions which prevented her from returning to her job using hooks and knives.

On June 11, 2002, claimant was moved to a job "picking trim" to accommodate her work restrictions. The "picking trim" job involves separating fat and lean meat on a conveyor belt and does not require the use of hooks or knives. This job became claimant's permanent job on April 3, 2003. And claimant continued working this job until her termination.

Claimant testified that her upper extremity problems continued and finally worsened to the point that she could no longer work and that is why she left her job with respondent. The medical records do not support claimant's testimony.

After reaching maximum medical improvement for her bilateral upper extremity injuries the claimant did not seek additional medical treatment for approximately a year. During this time she continued to perform the light-duty work as a picker which had become her permanent job position.

When she sought treatment in February 2004 her complaints were of left hand pain as well as pain in her bilateral elbows, worse on the right. As she was provided treatment

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[7] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

she additionally complained of chest musculature pain. During the course of treatment with the plant nurses and the physician's assistant, her problems improved except for her left hand pain. Claimant was referred back to Dr. Guillermo Garcia who ultimately recommended surgery to remove a cyst on claimant's left ring finger but claimant declined to have the surgery.

Drs. Garcia and Pedro Murati as well as Danny Briggs, physician's assistant, all testified that claimant's continued work in the light-duty job did not aggravate her bilateral upper extremity injuries. Stated another way, the doctors agreed that claimant's diagnosed bilateral carpal tunnel syndrome and bilateral epicondylitis would on occasion be painful but that nothing she did in the light-duty job aggravated or worsened those conditions.

The date of accident in this case is the last day claimant performed her regular work before she was placed in the accommodated job "picking trim" on June 11, 2002. The Board finds claimant did not suffer an additional aggravation or injury after she was placed in the accommodated position. Consequently, the Board modifies the ALJ's Award to find the date of accident is June 10, 2002. However, this modification of the date of accident does not otherwise alter the ALJ's award of compensation against Liberty as the modified date of accident remains within Liberty's coverage period.

Claimant argues she is entitled to receive a work disability (a permanent partial general disability greater than the functional impairment rating) because her termination was directly related to and caused by her work-related accidental injury.

The Kansas appellate courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[8] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[9]

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[8] *See, e.g., Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[9] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1988).

In *Foulk*[10], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[11] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[12] or not within the worker's medical restrictions.[13]

In this case the claimant continued to perform her accommodated job for approximately a year after she reached maximum medical improvement for her upper extremity complaints. Claimant sought additional medical treatment which focused primarily upon her left hand as her other upper extremity complaints resolved during treatment. Claimant then unilaterally determined that she could no longer perform the accommodated light-duty work which had become her permanent job. Again, as previously noted, Drs. Garcia and Murati as well as physician's assistant, Mr. Briggs agreed the light-duty job did not aggravate her upper extremity condition. Moreover, claimant has made no attempt to find employment.

After claimant was a no call, no show for three consecutive work days her employment was terminated according to respondent's personnel policy. Claimant, without justification, voluntarily terminated her job with respondent that she was capable of performing and that paid the same wage as her pre-accident wage. Consequently, the Board will impute that wage to claimant. As this imputed wage exceeds 90 percent of claimant's pre-injury average gross weekly wage, claimant's permanent partial general disability benefits are limited to her functional impairment rating.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 28, 2005, is modified to find the date of accident is June 10, 2002 and is affirmed in all other respects.

IT IS SO ORDERED.

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Niesz v. Bill's Dollar Stores*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[12] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[13] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

Dated this _____ day of January 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and Liberty Mutual Ins. Co.
D. Shane Bangerter, Attorney for Respondent and Fidelity & Guaranty Ins. Co.
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director